KOTAK MALAYSIA (KOM) SDN BHD

v.

PERBADANAN NASIONAL INSURANS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[SUIT NO: D5-22-420-96]
2 MARCH 2005

INSURANCE LAW: *Marine insurance - Construction of policy - Open cover policy - Purport of - Whether off-cover policy could contradict terms and conditions of marine open-cover policy - Whether terms of marine open-cover policy prevails - Whether a mistake in off-cover policy can be rectified to reflect terms of marine open-cover policy - Whether court empowered to rectify - Specific Relief Act 1950, s. 30 - Whether off-cover policy terminated when goods delivered to warehouse in Port Klang*

INSURANCE LAW: *Marine insurance - Damage to goods - Claim for loss - Open cover policy - Purport of - Whether off-cover policy could contradict terms and conditions of marine open-cover policy - Whether terms of marine open-cover policy prevails - Whether a mistake in off-cover policy can be rectified to reflect terms of marine open-cover policy - Whether court empowered to rectify - Specific Relief Act 1950, s. 30 - Whether off-cover policy terminated when goods delivered to warehouse in Port Klang*

This was an action by the plaintiff against the defendants/insurers following a fire which broke out at Gudang No. 3B ('Gudang Warehouse 3B') destroying the plaintiff's goods. The facts were that a marine open-cover policy (indicating general insurance terms within which other specific policies may be made) was issued by the defendant in favour of the plaintiff dated 25 April 1989. Pursuant thereto, the defendant further issued an off-cover policy (indicating specific insurance terms and generally within the ambit of the open-cover policy) dated 20 June 1990. Meanwhile, the goods were duly shipped from Tacoma, USA and then trans-shipped by vessel at Japan to Port Klang, Malaysia. Upon arrival at Port Klang the goods were cleared through customs by Lautan Tujuh (their forwarding agent) and moved to Gudang No. 3B by Konsortium Perkapalan (the hauliers). On 12 July 1990, a fire broke out at Gudang 3B destroying the goods. The plaintiff commenced the present suit against the defendant on the basis that the off-cover policy had mistakenly stated that the voyage

was 'from Tacoma USA to Kuala Lumpur *via* Port Klang'' instead of 'from Tacoma USA to warehouse in Malacca *via* Port Klang.' The plaintiff further claimed that the goods were kept in Gudang 3B at Port Klang in transit awaiting onward carriage to the plaintiff's final warehouse in Malacca. It was the plaintiff's contention that while the off cover policy was in force and the said goods were insured, the said goods became total loss as a result of the fire at the said Gudang 3B, a peril insured against. The plaintiff claimed that destruction of the goods by the fire was covered by Institute Cargo Clauses (A) whereby the insurance covers all risks unless excluded by cl. 4 of which fine has not been excluded. The plaintiff therefore claimed that the defendant was in breach of the contract of insurance as contained in and evidenced by the marine open-cover and the off-cover policy for refusing liability. The defendant, on the other hand, contended that the plaintiff's claim was outside the duration of the coverage under the off-cover policy, having terminated when the goods were delivered to Gudang 3B Warehouse before the fire broke out, and therefore, the defendant was not liable under the off cover policy. The issues in dispute herein were (1) what was the purport of the marine open-cover policy dated 25 April 1989; (2) whether the contract of insurance (off cover policy) issued on 20 June 1990, pursuant to the marine open-cover policy dated 25 April 1989 could contradict the terms and conditions of the said marine open cover policy; (3) whether the contract of insurance (off cover policy) issued on 20 June 1990 pursuant to the terms of the Marine open-cover policy contained a mistake, and if so could it be rectified; (4) whether the insurance provided by the contract of insurance (off-cover policy) issued on 20 June 1990 pursuant to the said marine open-cover policy had terminated when the goods were delivered to Gudang 3B Warehouse at Port Klang.

Held (allowing the plaintiff's claim):

(1) An open-cover policy is a long term contract effected with the underwriters by exporters and importers for the protection of their shipments. It is couched in general terms as the names of the carrying vessel and other details of the shipment are not available. Detailed subsequent policies, in the form of off-cover policies therefore must be issued from time to time, usually as the shipments are made and declared. In the present case, the plaintiff had negotiated for a marine open-cover policy and had requested for general coverage for 'worldwide to warehouse in Malacca *via* Port Klang' at the

value not exceeding RM500,000. It was not disputed that the defendant issued the marine open-cover to the plaintiff and the maximum amount insured was to the limit of RM500,000. Subsequent to the issuance of the marine open-cover policy on 25 April 1989, the plaintiff continued to obtain individual certificates of insurance for each of its consignments purchase from the vender in Tacoma, USA. These certificates or policies of insurance were all issued 'off cover' the marine open-cover policy. The schedule to the off-cover policy declared it to be a declaration, in particular declaration no: 3319 of open-cover policy no: DMOC89001524H.

(2) A reading of the marine open-cover policy and the off-cover policy suggested that the off-cover policy was subject to the terms and conditions of the marine open-cover policy and it followed necessarily that the off-cover policy could not contradict the terms and conditions of the marine open-cover policy, unless there was clear evidence to show that the parties intended otherwise. The intent and scope of coverage in the marine open-cover policy and the off-cover policy appeared to be different. Both these documents were proffered by the defendant. The position taken by the defendant in respect of voyage in the policy off-cover of the marine open-cover was clearly inconsistent with the scope of voyage in the marine open-cover. If this position gave rise to an ambiguity, then the ambiguity must be construed against the defendant, the insurer. In the event of any inconsistencies between the two policies, the terms of the marine open-cover policy should prevail.

(3) The off-cover policy did not truly represent the intention of the parties in that it departed from the original agreement between the parties. Thus, the court by virtue of s. 30 of the Specific Relief Act 1950 was empowered to rectify the off-cover policy. The plaintiff's evidence was more probable towards the real intention of the parties. Therefore, both on principles and on authorities, rectification of the off-cover policy was necessary in order to give effect to the true intent of the parties and to the true intent and purport of the agreement between the parties. There was no evidence to show that the parties, particularly the plaintiff, had changed their intention with regard to the said voyage clause as appeared in the off-cover policy. Here, in order for the plaintiff to claim for compensation or damages under the policy, the

plaintiff had to prove that the policy was still in force (not yet terminated) at the time of the fire which destroyed their goods. In doing so, the plaintiff had to show that the voyage clause in the off-cover policy contained a mistake and being contrary to the voyage clause in the marine open-cover policy. It was necessary for the plaintiff to pray for an order of rectification of the said voyage clause in the off-cover policy in order to prove that the said insurance coverage was not terminated on the delivery of the goods to warehouse Gudang 3B as alleged by the defendant. The goods were kept in Gudang 3B (at the time of the fire) awaiting transit to the plaintiff's warehouse in Malacca. The voyage destination was still not completed at the time of the fire and therefore the coverage was still in force then.

(4) The defendant had failed to prove that it was the intention and agreement of the parties that the voyage was to end in Kuala Lumpur (as stated in the off-cover policy) contrary to the marine open-cover policy. The defendant had also failed to prove that the goods were not in transit while they were in the said warehouse Gudang 3B. They were bound by their own loss adjuster's report (D20). The court found that the insurance provided by the contract of insurance (the off-cover policy dated 20 June 1990) issued pursuant to the marine open-cover policy had not terminated when the goods in question were delivered to Gudang 3B at Port Klang.

Case(s) referred to:

American Home Assurance Co v. Nalin Industries Sdn Bhd [1993] 3 CLJ 319 ***(refd)***

Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd & Anor [2004] 1 CLJ 357 ***(refd)***

Frederick E Rose (London) Ltd v. William H Pirn & Co Ltd [1953] 2 QB 450 ***(refd)***

Kandasami v. Mohamed Mustafa [1983] 2 CLJ 55; [1983] CLJ (Rep) 7 PC ***(refd)***

Malaysia National Insurance Sdn Bhd v. Abdul Aziz Mohamed Daud [1979] 2 MLJ 29 ***(refd)***

Malaysia National Insurance Sdn Bhd v. Malaysia Rubber Development Corporation [1996] 2 MLJ 124 ***(refd)***

National Chew Search Corpn (SEA) Pte Ltd & Anor v. Holel Ambasador (Malaysia) Sdn Bhd [1975] 2 MLJ 193 ***(refd)***

Ng Chun Lin & Anor v. Foo Lian Sin & Anor [2000] 6 CLJ 133 HC ***(refd)***

Pacific & Orient Insurance Co Sdn Bhd v. B Karthivelu [1992] 1 CLJ 348; [1992] 1 CLJ (Rep) 348 SC ***(refd)***

Sadler Brothers Company v. Meredith [1963] 2 LLR 293 ***(refd)***
The "Melanie" United Oriental Assurance Sdn Bhd, Kuantan v. WM Mazzarol [1984] 1 MLJ 260 ***(refd)***
Verna Trading Pty Ltd v. New India Assurance Pte Ltd [1991] 1 VR 129 ***(refd)***

Legislation referred to:
Civil Law Act 1956, ss. 5, 11
Evidence Act 1950, ss. 18, 20, 21, 101, 102
Specific Relief Act 1950, s. 30

English Marine Insurance Act 1906 [UK], s. 29

Other(s) refferred to:
Mac Gillvray & Parkington on Insurance Law, 7th edn, para 1953, p 816
Marine Insurance: Its Principles and Practice, 5th edn, p 5
RH Brown, *The Institute Cargo Clauses 1982,* 2nd edn, pp 18-19 & 21
Sarkar on Evidence, 12th edn, p 191

For the plaintiff - G Rajasingam (Zoe Leong with him); M/s Shearn Delamore & Co
For the defendant - Brian Savaridas; M/s Jeff Leong Poon & Wong

JUDGMENT

Ramly Ali J:

[1] The plaintiff is a company incorporated in Malaysia and at all material times was fully interested in a policy of marine insurance no: DMOC90003319H underwritten by the defendant. The defendant is an insurance company previously known as Union Insurance Malaysia Sdn. Bhd.

Relief Sought By The Plaintiff

[2] The relief sought by the plaintiff in the present case as set out in para. 11 of the statement of claim, are as follows:

(i) a declaration that the plaintiff is entitled to the remedy of rectification of the Off-Cover Policy in respect of voyage for it to read "Worldwide to Malacca *via* Port Klang" to reflect the common agreement between the parties as contained by the Marine Open-Cover Policy;

A (ii) an order for rectification of the off-cover policy in respect of the voyage for it to read "Worldwide to warehouse in Malacca *via* Port Klang" to reflect the common agreement between the parties as contained in and evidenced by the Marine Open Cover Policy;

B (iii) the sum of RM173,951.65;

(iv) interest at 8% per annum from the date of loss ie, 12 jULY 1990 to the date of judgment pursuant to s. 11 of the Civil Law Act 1956;

C (v) such other or further relief that the Honourable Court may make.

Brief Facts

D **[3]** The defendant issued a Marine Open-Cover Policy no: DMOC89001524H ("Marine Open-Cover Policy") dated 25 April 1989 in favour of the plaintiff. Note in particular the following portions of the Open-Cover Policy schedule:

E (a) Conveyance: To be Advised; Departure to be advised;

(b) Voyage: From Worldwide to warehouse in Malacca *via* Port Klang;

F (c) lnterest and Markings: On Kraftliner in rolls medium paper in rolls stitching wire in rolls and/or cargo and/or interest to be advised; and

(d) The following clauses and conditions apply to this policy: Institute Cargo Clauses (A).

G **[4]** Pursuant thereto, the defendant issued the policy of Marine Insurance no. DMOC90003319H ("Off-Cover Policy") dated 20 June 1990 bearing the following corresponding particulars:

H (a) Conveyance: Arnold Maersk V9009; Sailing on or about 7 May 1990;

(b) Voyage: Tacoma U.S.A. to Kuala Lumpur *via* Port Klang;

(c) lnterest and markings: 121 rolls 140.639 metric tons Kraftliner
I Boards valued at RM175,708.74 Open-Cover Policy no: DMOC89001524H;

(d) The following clauses and conditions apply to this policy: as per Open-Cover Terms and Conditions.

[5] The goods were duly shipped in the vessel "Arnold Maersk V9009" at Tacoma, USA and then trans-shipped by the vessel "Maersk Tauro 9022" at Kobe, Japan to Port Klang, Malaysia.

[6] For the purposes of clearing this particular shipment, the plaintiff appointed Lautan Tujuh Sdn. Bhd. as their forwarding agent ("Lautan Tujuh"). The hauliers were Konsortium Perkapalan Berhad ("Konsortium Perkapalan"). The owners/operators of a warehouse described as 'Gudang No. 3B ("Gudang 3B") located at Kobena Warehouse Kompleks, Jalan Pelabuhan, 42000 Port Klang' were Transit & Packing Sdn. Bhd. ("Transit & Packing").

[7] Upon arrival at Port Klang the goods were cleared through customs by Lautan Tujuh and moved to Gudang No. 3B by Konsortium Perkapalan (the hauliers).

[8] On 12 July 1990, a fire broke out at Gudang 3B destroying the goods.

The Plaintiff's Claim

[9] The plaintiff commenced the present suit against the defendant on the basis that the Off-Cover Policy mistakenly states that the voyage was "from Tacoma. USA to Kuala Lumpur *via* Port Klang" instead of "from Tacoma USA to Warehouse in Malacca *via* Port Klang". The plaintiff maintained that the phrase "from Tacoma, USA to Kuala Lumpur *via* Port Klang" as appeared in the Off-Cover Policy was a typo error. Under cross-examination PW1 maintained that it was not the intention of the plaintiff to cover this policy for voyage "from Tacoma USA to Kuala Lumpur *via* Port Klang". The plaintiff claimed that the goods arrived at Port Klang on 5 July 1990 and were kept in Gudang 3B at Port Klang in transit awaiting onward carriage to the plaintiff's final warehouse in Malacca. It is the plaintiff's contention that while the Off-Cover Policy was in force and the said goods were insured, the said goods become total loss as a result of fire at the said Gudang 3B Warehouse on or about 12 July 1990, a peril insured against. The plaintiff claimed that destruction of the goods by fire is covered by Institute Cargo Clauses (A) whereby the insurance covers all risks unless excluded by cl. 4 of which fine has not been excluded. The plaintiff

therefore claimed that the defendant was in breach of the contract of insurance as contained in and evidenced by the Marine Open-Cover and the Off-Cover Policy for refusing liability.

The Defence

[10] The defendant, on the other hand, contended that the plaintiff's claim was outside the duration of the coverage under the Off-Cover Policy, having terminated when the goods were delivered to Gudang 3B Warehouse before the fire broke out and therefore, the defendant is not liable under the Off-Cover Policy. The defendant insisted that they had refused the plaintiff's claim, not on the ground that the voyage clause was incorrect but on the ground that the duration of coverage had terminated at the time of the fire.

Issues To Be Tried

[11] The issues to be tried are as follows:

(a) What is the purport of the Marine Open-Cover Policy no: DMOC89001524H dated 25 April 1989?

(b) Whether the contract of insurance, (Off-Cover Policy no: DMOC90003319H) issued on 20 June 1990, pursuant to the Marine Open-Cover Policy no: DMOC89001524H dated 25 April 1989 could contradict the terms and conditions of the said Marine Open-Cover?

(c) Whether the contract of insurance, (Off-Cover Policy no: DMOC90003319H) issued on 20 June 1990, pursuant to the terms of the said Marine Open-Cover contained a mistake and if so can it be rectified now?

(d) Whether the insurance provided by the contract of insurance (Off-Cover Policy no: DMOC90003319H) issued on 20 June 1990 pursuant to the said Marine Open-Cover had terminated when the goods were delivered to Gudang 3B Warehouse at Port Klang?

[12] The court shall now deal with the issues.

(a) What Is The Purport Of The Marine Open-cover Policy No: Dmoc89001524h Dated 25 April 1989

[13] The term "Open-Cover Policy" is a term of usage within the marine industry which though not statutorily defined, is in substance akin to a 'floating policy' which is statutorily defined. In general, an Open-Cover Policy is a long term contract effected with the underwriters by exporters and importers for the protection of their shipments. This form of policy is used by shippers as it is not practical to effect all cargo insurances individually having regard to the volume of overseas trade. It is couched in general terms as the names of the carrying vessel and other details of the shipment are not available. Detailed subsequent policies, in the form of off-cover policies, therefore, must be issued from time to time, usually as the shipments are made and declared.

[14] Templeman on *"Marine Insurance: Its Principles and Practice"* 5th edn at p. 5 has this to say about "Open-Cover Policy":

> Another method of insurance, akin to floating policy is by "Open-Cover" – an agreement whereby the underwriter undertakes to insure all shipments or interest of the assured for certain voyages or trades, either at specified rates of premium, or at rates to be arranged. The underwriter is notified by the assured when the shipments are made, of the interests attaching to the cover – termed declarations "Off-Cover" – and policies are then issued from time to time, as and when required.

[15] An "Open-Cover Policy" is not defined anywhere statutorily. The English Marine Insurance Act 1906 only defines floating policy. Section 29 of the 1906 Act provides:

(1) A floating policy which describes the insurance in general terms and leaves the name of the ship or ships and other particulars to be defined by subsequent declarations.

(2) The subsequent declaration or declarations may be made by endorsement on the policy, or in other customary manner.

(3) Unless the policy otherwise provides, the declarations must be made in the order dispatch or shipment. They must, in the case of goods, comprise all consignments within the terms of the policy, and the value of the goods or other property must

A be honestly stated, but an omission or erroneous declaration may be rectified even after loss or arrival provided the omission or declaration was made in good faith.

[16] The English Marine Insurance Act 1906 is applicable in B Malaysia, as part of our law by virtue of s. 5 of the Civil Law Act 1956.

(see: The decision of the Federal Court in *The "Melanie" United Oriental Assurance Sdn. Bhd., Kuantan v. W. M. Mazzarol* [1984] 1 MLJ 260.

C

[17] E.R. Hardy Ivany in his treatise *Marine Insurance* (4th edn) defines 'floating policies' as follows:

> Floating policies are those in which the class of the subject matter D insured is named, and also the maximum limit of value fixed. But specific things insured and their value individually have to be subsequently declared by the assured.

[18] Referring to a "floating policy" Templeman observes as follows:

E

> The use of this type of policy, often described nowadays as "open" or "declaration" policy, is usually confined to insurances in connection with cargoes and affords the assured the satisfaction of knowing that all shipments which come within its terms are F automatically covered by insurance, provided that the declarations thereunder are duly and properly made. No name of any special vessel is inserted in the policy, but a clause is usually incorporated in the policy with regard to the types of vessels on which the shipments are to be made. The policy may be issued for a specified considerable amount, and the names of the vessels, G particulars of the interests and their value of insurance, termed declarations are subsequently and from time to time, made either by endorsement on the policy itself, the declarations being initialed by the underwriter to show that they have been noted or approved, or in some other customary manner, eg, by filing in the necessary particulars on a form specifically provided for that H purpose ...

[19] At p. 6 of the treatise, Templeman also states that:

> usually the individual certificate will not set out in full the wording of the underlying floating policy or Open-Cover which may have I to be referred to in certain circumstance in order to determine the whole insurance conditions.

[20] In the present case, the plaintiff's witness PW1 stated clearly that the plaintiff negotiated for a Marine Open-Cover Policy with the same characteristics as already described above. In his evidence-in-chief, PW1 said that the plaintiff requested for general coverage for "worldwide to warehouse in Malacca *via* Port Klang" at the value not exceeding RM500,000. When asked why the plaintiff particularly requested for cover for "worldwide", PW1 answered that it was because the plaintiff sourced for raw materials from various countries and not from one particular country. Furthermore, PW1 gave evidence that the plaintiff had to advise the defendant of the conveyance and the departure of the shipment. On the facts of this case, it is also not disputed that the defendant issued the Marine Open-Cover to the plaintiff and the maximum amount insured was to the limit of RM500,000.

[21] Subsequent to the issuance of the Marine Open-Cover policy on 25 April 1989 the plaintiff continued to obtain individual certificates of insurance for each of its consignments purchase from the vendor Weyer Laeusser Company in Tacoma, USA. These certificates or policies of insurance were all issued "off-cover" the Marine Open-Cover Policy. The Schedule to the Off-Cover Policy declares it to be a declaration, in particular declaration no: 3319 of Open-Cover Policy no: DMOC89001524H.

(b) Whether The Contract Of Insurance (Off-cover Policy No: Dmoc90003319h) Issued On 20 June 1990 Pursuant To The Marine Open-cover Policy No: Dmoc89001524h Dated 25 April 1989 Could Contradict The Terms And Conditions Of The Said Marine Open-cover Policy?

[22] Given the purport of the Marine Open-Cover Policy as outlined above, the court is of the view that any individual insurance policy issued 'off-cover' the Marine Open-Cover must be in compliance with the original intent and purport of the Marine Open-Cover unless there are clear evidence to show that the parties intended otherwise. It is not disputed between the parties that the defendant undertook *vide* the Marine Open-Cover Policy to issue "Policies and/or Certificates of Insurance" in respect of all shipments falling within the limit of this Open-Cover ..." This phrase is incorporated in the Marine Open-Cover Policy. The Schedule to the Marine Open-Cover Policy, at p. 4, under the term "Declaration" reads that the Marine Open-Cover applies to "Each And Every Shipment". In the Schedule to the Off-Cover Policy (which states that it is a declaration), that is to say

declaration no: 3319, of the Open-Cover Policy no: DMOC89001524H. Also the Schedule itself reads that the clauses and conditions which apply to the Off-Cover Policy are "as per Open-Cover terms and conditions". Hence, a reading of the Marine Open-Cover Policy and the Off-Cover Policy suggests that the Off-Cover Policy is subject to the terms and conditions of the Marine Open-Cover Policy and it would follow necessarily that the Off-Cover Policy cannot contradict the terms and conditions of the Marine Open-Cover Policy, unless there are clear evidence to show that the parties intended otherwise.

[23] In relation to this issue, the court would like to refer to the "Endorsement" to the Off-Cover Policy (exh. P2) which appears at p. 18 of Bundle A. This endorsement was issued subsequent to the issuance of the Off-Cover Policy with the view to correct the insured's name in the Schedule to the Off-Cover Policy. PW1 has testified that there is a typo error to the name. On the defendant's own volition the defendant issued this endorsement (exh. P2). DW2 agreed in her evidence that exh. P2 was issued by the defendant. In the said endorsement, the term "Voyage" is once again described as "Worldwide To Warehouse In Malacca *Via* Port Klang". Since the defendant issued the said endorsement (P2) and the result is that the endorsement now states the true purpose and intent of this voyage clause, the question to ask is why would the defendant issue an endorsement which renewed the clause "Worldwide To Warehouse In Malacca *via* Port Klang", if that is not the true intention and purposes of the parties as earlier stipulated in the Marine Open-Cover Policy? The court is of the view that upon construing the term "Voyage" both in the Marine Open-Cover Policy and in the subsequent Off-Cover Policy as well as the endorsement (P2) the true intention of the parties is that the voyage should cover "Worldwide to Warehouse in Malacca *via* Port Klang". If there is any ambiguity on the true scope of the voyage, then such ambiguity must be read against the defendant. In *Kandasami v. Mohamed Mustafa* [1983] 2 CLJ 55; [1983] CLJ (Rep) 7 the Privy Council held that it is trite principle of construction that if a document *inter partes* contains an ambiguity which cannot be satisfactorily resolved, it is to be construed adversely to the party who proffered it for execution. The rule of *contra proferentum* shall apply. This principle is equally applicable to contracts of insurance. This conclusion draws support from the judgment of the Federal Court in *Malaysia National Insurance Sdn Bhd. v. Abdul Aziz bin Mohamed Daud* [1979] 2 MLJ 29 where Raja Azlan Shah FCJ opined:

> It is of course established law that in the case of motor insurance policy which is a contractual document, is subject to the same general rules of interpretation as any other written document ... Only if there is a clause in the policy which is open to two constructions, the Court will construe it *contra proferentum*, this is, against the insurers.

[24] In the present case, the intent and scope of coverage in the Marine Open-Cover Policy and the Off-Cover Policy appears to be different. Both these documents were proffered by the defendant. The position taken by the defendant in respect of voyage in the policy off-cover of the Marine Open-Cover is clearly inconsistent with the scope of voyage in the Marine Open-Cover. If this position gives rise to an ambiguity, then the ambiguity must be construed against the defendant, the insurer.

(see also: *Pacific & Orient Insurance Co. Sdn. Bhd. v. B. Karthivelu* [1992] 1 CLJ 348; [1992] 1 CLJ (Rep) 251).

[25] Based on the above considerations, the court is of the view that the Off-Cover Policy which was issued pursuant to the Marine Open-Cover Policy cannot contradict the terms and conditions of the Marine Open-Cover Policy, unless there are convincing evidence to show that was the clear intention of both parties – ie, the plaintiff as the insured and the defendant as the insurer. In the event of any inconsistencies between the two policies, the terms of the Marine Open-Cover Policy shall prevail.

(c) Whether The Contract Of Insurance (Off-cover Policy No: Dmoc90003319h) Issued On 20 June 1990 Pursuant To The Terms Of The Marine Open-cover Policy Contained A Mistake And If So Can It Be Rectified Now?

[26] The court is satisfied that the common agreement between the parties on the scope of coverage is as per the Marine Open-Cover Policy, namely the voyage covered would be from "Worldwide to Warehouse in Malacca *via* Port Klang". It has also been concluded that the Off-Cover Policy which is subject to the terms and conditions of the Marine Open-Cover Policy cannot contradict the Marine Open-Cover Policy.

[27] The plaintiff's evidence shows that subsequent to a declaration made by the plaintiff (in respect of the shipment in question) to the brokers (Mega Insurance Brokers Sdn. Bhd.) the defendant caused to be issued on 20 June 1990, the said Off-Cover Policy. PW1, who is the Plaintiffs Finance and

Administrative Officer, specifically insisted (in the course of negotiation) that all individual policies issued off-cover the Marine Open-Cover Policy are to be for the voyage termed as "from port of loading worldwide to warehouse in Malacca *via* Port Klang". No evidence has been led to contradict this by the defendant. The main reason why the plaintiff insisted on this terms is because the plaintiffs' factory was in Malacca and still is. The plaintiffs' warehouse in Malacca was the intended final destination and all intentions and purposes pointed towards coverage until the final destination, ie, the plaintiffs warehouse in Malacca. According to PW1 evidence, in the course of negotiation, PW1 was assured that should there be any discrepancy or inconsistency in the Off-Cover Policy, the plaintiff would be entitled to fallback on the Marine Open-Cover Policy as the terms of the Off-Cover Policy were subject to and issued off-cover of the Marine Open-Cover Policy. This evidence has not been challenged. In the circumstances, the plaintiff insisted that the Off-Cover Policy mistakenly described the voyage as "from Tacoma, USA to Kuala Lumpur *via* Port Klang."

[28] It is trite that an insurance policy may be rectified after it's issuance if there was a common prior agreement between the insurer and the insured in terms that are different to that recorded in the policy. In such instances of "mutual mistake" then the discretionary remedy of rectification would be ordered by the Court. Section 30 of the Specific Relief Act 1950, specifies the circumstances in which an instrument may be rectified. The section is reproduced below:

> When through fraud or mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party, or his representative in interest, may institute a suit to have the instrument rectified: and if the Court find it clearly proved that there has been fraud or mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the Court may in its discretion rectify the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

[29] In the present case, it is the evidence of the plaintiff that:

(a) the existence, validity and the accuracy of the terms and conditions of the Marine Open-Cover are not disputed by the defendant;

(b) the Off-Cover Policy is subject to the terms and conditions of the Marine Open-Cover;

(c) the said subsequent Off-Cover Policy was in fact issued "off-cover" the Marine Open-Cover;

(d) it was known to the defendant that all subsequent policy of insurance issued off-cover the Marine Open-Cover was to be subjected to the same duration of voyage ie, "from the port of loading worldwide to warehouse in Malacca *via* Port Klang";

(e) the defendant subsequently did issue separate and individual policies "off-cover" the Marine Open-Cover; and

(f) that all of the subsequent individual policies (save for the Off-Cover Policy in question) issued "off-cover" for the rest the consignment were covered "from the port of loading worldwide to warehouse in Malacca *via* Port Klang".

[30] The court is satisfied that the Off-Cover Policy in question does not truly represent the intention of the parties in that it departs from the original agreement between the parties. Thus, the court by virtue of s. 30 of the Specific Relief Act 1950 is empowered to rectify the Off-Cover Policy. The extent to which the court is prepared to lend its hand to rectify a document was considered by Denning LJ (as he then was) in *Frederick E Rose (London) Ltd. v. William H Pirn & Co. Ltd.* [1953] 2 QB 450 at p. 461:

> In order to get rectification it is necessary to show that the parties were in complete agreement upon the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, one does not look into the inner minds of the parties – into their intentions – any more than one does in the formation of any other contract. One looks at their outward acts, that is at what they said or wrote to one another in coming to an agreement and then compares it with the document which they have signed. If one can predicate with certainty what the contract was and that it is, by a common mistake wrongly expressed in the document, then one rectifies the document; but nothing less will suffice.

[31] This principle was followed by Kang Hwee Gee J in *Ng Chun Lin & Anor v. Foo Lian Sin & Anor* [2000] 6 CLJ 133 where it was held that a policy of insurance may be rectified after its issuance and it is further supported by an instructive passage

in the treatise *Templeman on Marine Insurance: Its Principles and Practices:*

> If there is evidence, provided by the slip or by the conduct of the parties at the time of the contract was made that the parties to the contract were of one mind and clearly had a common intention which owing to an error had not been expressed unambiguously in the policy, then the policy may be rectified, in which event the ambiguity will, of course, be removed.

[32] In the present case, the intention of the parties can be found upon a clear reading of the Marine Open-Cover which has been agreed upon by the parties to be the basis of which issurance of "policies or certificates of insurance in respect of all shipment falling within the limits of the Open-Cover Policy". Furthermore, PW1, the Finance and Administrative Manager of the plaintiff, was the very person who negotiated on behalf of the plaintiff for the Marine Open-Cover Policy.

[33] PW1 has personal knowledge of the chronology of events from the issuance of the Marine Open-Cover Policy and the Off-Cover Policy to the fire which destroyed the plaintiff's goods in Gudang 3B and to the subsequent repudiation of the insurance contract by the defendant. Contrary to that, the defendant has not led any evidence nor called any witnesses who can testify to the true intent of the parties when they negotiated the insurance contract. During cross-examination, the defendant's witness, DW2, stated that she has no personal knowledge over the matter as she was not with the defendant at the material time. She agreed that she was not present when the policy was negotiated and further did not know who was the officer-in-charge of the defendant when the policy was negotiated and issued. DW2 was not aware whether the intention was to include further destination within Malaysia after Port Klang. The defendant did not call their employees or ex-employees who were involved or had personal knowledge of the negotiations between the plaintiff and the defendant pursuant to the Marine Open-Cover Policy. No evidence was led to show why the defendant was unable to call the employees concerned or attempt to trace any of them. In the premise, the evidence of PW1 is to be preferred over the evidence of DW2 for the simple reason that PW1 was present at the time the contract was negotiated and made and is able to testify as to the real intention of the parties. The real intention of the parties is not embodied in the Off-Cover Policy and that due to a mutual

mistake between the parties, the Off-Cover Policy does not truly express their intention as stipulated in the earlier Marine Open-Cover Policy.

[34] In further support of the plaintiff's intention the plaintiff has also led evidence that there were other Bills of Lading and insurance contracts made at that time which alluded the same terms as the Marine Open-Cover (see: exhs. P5, P6, P7 P8 and P9 in Bundle A). All those supporting documents clearly evidenced that the plaintiff's shipments, which were of a similar nature to the goods in question, were bound for Malacca *via* Port Klang.

[35] The court is satisfied that the plaintiff's evidence is more probable towards the real intention of the parties. Therefore, both on principles and on authorities the court is of the opinion that rectification of the Off-Cover Policy is necessary in order to give effect to the true intent of the parties and to the true intent and purport of the agreement between the parties. There is no evidence to show that the parties, particularly the plaintiff, has changed their intention with regard to the said voyage clause as appeared in the Off-Cover Policy.

[36] In their submissions, the defendant submitted that they were unable to fully appreciate how the rectification of the voyage clause would precipitate in an order for compensation, especially when the defendant had not refused the plaintiff's claim on the grounds that the voyage clause was incorrect but rather that the duration of coverage had terminated. The court is of the view that in order for the plaintiff to claim for compensation or damages under the policy, the plaintiff has to prove that the policy was still in force (not yet terminated) at the time of the fire which destroyed their goods. In doing so, the plaintiff has to show that the voyage clause in the Off-Cover Policy contained a mistake and being contrary to the voyage clause in the Marine Open-Cover Policy. That being the case, it is necessary for the plaintiff to pray for an order of rectification of the said voyage clause in the Off-Cover Policy in order to prove that the said insurance coverage was not terminated on the delivery of the goods to warehouse Gudang 3B as alleged by the defendant. The goods were kept in Gudang 3B (at the time of the fire) awaiting transit to the plaintiff's warehouse in Malacca. The voyage destination was still not completed at the time of the fire and therefore the coverage was still in force then.

(d) Whether The Insurance Provided By The Contract Of Insurance (Off-cover Policy No: Dmoc90003319h) Issued On 20 June 1990 Pursuant To The Said Marine Open-cover Policy Had Terminated When The Goods Were Delivered To Gudanq 3b Warehouse At Port Klang?

[37] It is the defendant's contention that the duration of coverage had terminated when the goods in question were delivered to Gudang 3B at Port Klang as it was not in "the ordinary course of transit" and the plaintiff had elected to use for storage other "than in the ordinary course of transit" as provided in cl. 8.1.2.1 (Duration of the Institute Cargo Clauses (A) (ICC) which provides that "the insurance attached from the time the goods leave the warehouse or place of storage at the place named therein for the commencement of the transit, continues during "the ordinary course of transit" and terminates on delivery to any other warehouse or place of storage, whether prior to or at the destination named therein which the assured elect to use for storage "other than in the ordinary course of transit." The circumstances which led the defendant to arrive at this conclusion are as follows:

(a) in "the ordinary course of transit", the goods would have been transported directly from the Port Klang to Malacca;

(b) instead, the goods were stored at Gudang 3B from 31 May 1990 (the date the defendant alleged the goods arrived at Port Klang) until the fire broke out on 12 July 1990, a period for 42 days, without being transported to Malacca;

(c) the plaintiff had not made any arrangement for the goods to be transported from Gudang 3B at all; and

(d) the plaintiff had not acted with reasonable dispatch in all circumstances within their control to transit the goods from Port Kang to Malacca.

[38] Clause 8.1 of the Institute Cargo Clause (A) reads:

> Duration
>
> 8.1. This insurance attached from the time the goods leave the warehouse or place of storage at the placed named herein for the commencement of the transit, continues during the ordinary course of transit and terminates either:

8.1.1. on delivery to the Consignees' or other final warehouse or place of storage at the destination named herein, A

8.1.2. on delivery to any other warehouse or place of storage, whether prior to or at the destination named herein, which the Assured elect to use either B

8.1.2.1. for storage other than in the ordinary course of transit, or

8.1.2.2. for allocation or distribution.

8.1.3. on the expiry of 60 days after completion of the discharge overside of the goods hereby insured from the overseas vessel at the final port of discharge. C

[39] The plaintiff submitted that the true intent and scope of the Marine Open-Cover Policy was for the defendant to provide coverage from worldwide to warehouse in Malacca *via* Port Klang and the Off-Cover Policy being issued "off-cover" the Marine Open-Cover Policy is subject to the terms of the Marine Open-Cover Policy. It is the plaintiff's evidence that the goods arrived at Port Klang on 5 July 1990 and were kept in Gudang 3B at Port Klang in transit awaiting onward carriage to the plaintiff's final warehouse in Malacca. (The fire occurred on 12 July 1990 ie, 7 days later). That being the case, the plaintiff argued that the scope of cover under the insurance provided by the defendant cannot be said to have terminated or ceased upon the goods delivered to Gudang 3B at Port Klang. D E F

[40] Both the Marine Open-Cover Policy as well as the Off-Cover Policy incorporate among others, the Institute Cargo Clause (A). Clause 8.1 states that the coverage of insurance continues "during the ordinary course of transit". For a better understanding of what is meant by "during the ordinary course of transit", the court refers to an Australian case of *Verna Trading Pty. Ltd. v. New India Assurance Pte. Ltd.* [1991] 1 VR 129, which considered a similar marine insurance duration clause where the coverage "continues during the ordinary course of transit". In that case, Orminston J gave some guidance on how to determine "ordinary course of transit", when he said (at p. 168): G H

> It would therefore appear that the "ordinary course of transit" would end if an act or acts took place which would, reasonably considered, indicate that the transit had terminated or that the transit had been so interrupted that it could not be seen as likely that the transit would re-commence without there being a positive decision to that effect by the assured or consignee. I

[41] R.H. Brown in *The Institute Cargo Clauses 1982*, 2nd edn, pp 18-19 and 21 described what is "ordinary course of transit" as follows:

> The term "ordinary" is deemed to embrace the customary method of carriage relevant to the type of goods and most direct route to the destination. It would include delays during which the goods are held up pending inspection by the customs or similar authorities, and awaiting arrival of the onward carrying conveyance or vessel, but would not include any delay that the assured could avoid or period of storage within the assured's control. Thus if the assured elects to use a port warehouse for storage, this would be deemed to be outside the ordinary course of transit.

[42] In *Malaysia National Insurance Sdn. Bhd. v. Malaysia Rubber Development Corporation* [1996] 2 MLJ 124, our Supreme Court referred to the definition of the word "transit" as expressed by Roskill J in *Sadler Brothers Company v. Meredith* [1963] 2 LLR 293, 307:

> ... "transit" means passage of carriage of goods from one place to another, and I think the goods were still being carried from one place to another even though the lorry in which they were being carried was temporarily parked. Obviously an exhaustive definition of transit is impossible, and equally undesirable and certainly I do not propose to attempt one. I am merely concerned with applying the facts of this case as I find them to be to this particular policy.

[43] Lee Hun Hoe CJ, at p. 126 held that in construing the provisions of the policy the court has to look at the facts of the particular case. His Lordship then referred to a passage in *MacGillvray & Parkington on Insurance Law* (7th edn) para 1953 at p. 816 which reads as follows:

> The moment when transit ends has never been authoritatively determined. Sometimes the policy itself gives some guidance ...

[44] In the present case, the true intent and scope of the Marine Open-Cover Policy was for the defendant to provide coverage from worldwide (part of loading) to the plaintiff's warehouse in Malacca *via* Port Klang. More importantly, the Off-Cover Policy being issued "off-cover" the Marine Open-Cover Policy, is subject to the terms of the Marine Open-Cover. In the instance of the Clause of the Marine Open-Cover Policy, it is clear "Malacca" is to be the final destination and the goods in question are to go *via* Port Klang. Clause 8.1.1. of the Institute Cargo Clause (A)

clearly stipulates that the insurance coverage terminates "on delivery to the Consignees" or other final warehouse or place of storage at the destination named herein which must mean the final destination. In this instance, the warehouse which was burnt down (Gudang 3B) was not the consignees' warehouse nor was it the final warehouse as the goods were still in the ordinary course of transit to Malacca at the time of the loss.

[45] The defendant relied on the phrase "in the ordinary course of transit" as highlighted in *Verna Trading* case *(supra)* as well as *R.H. Brown in The Institute Cargo Clauses 1982 (supra)* ie, it should be read to mean goods were to have been transported within reasonable dispatch directly from Port Klang to Malacca. The defendant also cited cl. 18 of the Institute Cargo Clause (A) which provides that "the assured (plaintiff) shall act with reasonable dispatch in all circumstances within their control". The situation warrants the question:

> What is reasonable based on the facts and circumstances of the present case?

[46] The defendant claimed that the goods in question arrived a Port Klang on 31 May 1990 and were transported from Port Klang to Gudang 3B within the same day ie, 31 May 1990. The defendant argued that the goods could have been transported from Port Klang to Malacca directly on the same day. Instead, the defendant argued that goods were stored at Gudang 3B from 31 May 1990 until the fire broke out on 12 July 1990, a period of 42 days without being transported to Malacca. The defendant claimed that the plaintiff had not made any arrangement for the goods to be transported to Malacca, instead had elected to store the goods in Gudang 3B "other than the ordinary course of transit". Therefore, the defendant is saying that the plaintiff had not acted with reasonable dispatch in all circumstances within their control to transit the goods from Port Klang to Malacca.

[47] PW1 stated in his evidence, that the goods in question were 121 rolls of papers with each roll weighing more that 1 ton. The rolls had to be unstuffed and packed into lorries and taken by road to the plaintiff's warehouse and business premises in Malacca. In Gudang 3B, at the same time, there were other shipments of a similar nature which were temporarily stored for onward carriage to Malacca.

[48] In this case, it would be reasonable for the plaintiff's goods to be temporarily stored there for a good number of days until the goods can be transported to Malacca. Furthermore, the plaintiff has no control over the arrangements made by the forwarding agent as to how they wished to transport the goods from Gudang 3B to Malacca. Therefore, the plaintiff cannot be said to responsible for the delay (if any) as stipulated under cl. 18 of the Institute Cargo Clauses (A).

[49] The defendant has made numerous assumptions on the events and facts of the present case. The defendant has relied heavily on evidence of DW1 which are contradictory and beyond the scope of his expertise. Firstly, DW1 was tendered in as a loss adjuster and his testimony was to be his assessment of the damage to the plaintiff's goods. During cross-examination, DW1 clearly said that he was in the insurance adjusting business including marine insurance and that he and his company have never ventured into any other business besides loss adjusting. When queried further, DW1 went on to say that he has never acted as carrier for cargo and has never done freight forwarding or haulage. In his evidence, DW1 admits the followings:

(a) that he did not interview the owners of the vessel;

(b) that he did not interview the customs on this shipment;

(c) that he did not interview anyone from Konsortium Perkapalan Bhd;

(d) that he did not interview the freight forwarders Lautan Tujuh Sdn. Bhd. although he was aware that Lautan Tujuh Sdn. Bhd. were the freight forwarders;

(e) that he did not investigate who collected the cargo from the vessel;

(f) that he did not ask whether the rolls of paper needed special treatment for loading and unloading;

(g) that he did not ask what equipment was used to unload the goods from the containers;

(h) that conventional forklifts could not be used to carry the rolls as it would damage the rolls or might fall; and

(i) that he did not ascertain whether Transit & Packaging Sdn. Bhd. had this type of facility.

[50] DW1 was brought in to assess the damage sustained to the plaintiff's goods. After his assessment, DW1 stated that it was his duty to report his findings to the defendant. DW1 did report to the defendant and his findings were noted in his report (exh. D20). DW1's testimony was given in court on 9 June 2004 – some 14 years after the goods were destroyed by fire. His evidence in court departed considerably from his report which was made almost contemporaneously to the loss of the plaintiff's goods. DW1's evidence on the whole contradicts his own admissions in the adjuster's report in that the claim is genuine and payable by the defendant insurers.

[51] In his report (D20) DW1 concludes that "insured's various shipments of different kinds of paper were kept inside warehouse no: 3B, Port Klang for the purpose of temporary storage." Under the title "Verification of Loss" DW1 stated in his report as follows:

> In light of the above, our enquiries with Insured and their said warehouse operator indicate that the subject shipment stated in this Report was never, at any time, delivered to Insured's factory in Malacca, although the FCL containers were received in the warehouse 3B on 31st May 1990 but this shipment unstuffed therefrom on 2nd June 1990.

[52] Under "Recommendation", DW1 recommended the followings:

> 100% allowed is duly recommended for Insured's entire shipment consisting of 140.639 m/tons Kraftliner Board, stated in this Report.
>
> Furthermore, we find that the Policy Excess of 1% on Total Sum Insured, is not applicable in this instance as the damage was caused by fire, in accordance with written provisions of the said Policy Excess ...

[53] In his evidence in court, DW1 even said that he considered his report (D20) to be a "comprehensive report". It is unacceptable that the maker of the report (D20) seeks to contradict materially his own report 14 years after the event or after the date of the report. On this basis the court should give more weight to the report (D20). This is the document of the defendant, having been prepared for the defendant by it's own agent. More importantly DW2 in her evidence has said that the loss adjuster (DW1) was appointed by the defendant and the defendant accepted the Loss Adjuster's Report (D20). The

defendant did not write to DW1 to dispute the recommendation in the report. There is no dispute about the role of the adjuster (DW1) in this matter. He was appointed and authorised by the defendant to investigate the plaintiff's claim and to come up with necessary recommendation.

[54] He is the agent of the defendant. DW1 prepared the report in his capacity as the defendant's agent. The law regards his report as the defendant's own document. The admission made by DW1 in the report are admissible against the defendant. To support this findings the court relies on the decision of the Court of Appeal in the case of *Cheong Heng Loong Goldsmiths (KL) Sdn. Bhd. & Anor v. Capital Insurance Bhd. & Anor* [2004] 1 CLJ 357 where it was ruled:

> There is a second and equally strong reason for holding P9 to be admissible as to the proof of its contents. There is no dispute about the role of the adjusters, Thomas Howell. They were appointed and expressly authorised by the Respondent to investigate Chan's claim. They were there to find out if Chan's claim was genuine or fraudulent and to report their findings to the Respondent. That is precisely what they did. They prepared the report P9 in their capacity as the Respondent's agent. The law simply regards their report not as their document but as the Respondent's own document. The adjusters made admissions in report P9. They said that Chan's claim that he had been robbed was genuine and not fraudulent. That is an admission against the Respondent's interest It was admissible under ss 18, 20 and 21 of the Evidence Act 1950. It was substantive evidence.

[55] The Court of Appeal also referred to an earlier decision of the Federal Court in *National Chew Search Corpn (SEA) Pte. Ltd. & Anor v. Holel Ambasador (Malaysia) Sdn. Bhd.* [1975] 2 MLJ 193, where Wan Sulaiman FJ held:

> There was no suggestion that the contents of this statement, as opposed to the fact that it was made, is inadmissible. That it is admissible for such purpose there can be no doubt. In *Sarkar on Evidence* (12th Ed) at p 191 appears the following passage:
>
> > The declarations, admissions and acts of agents are admissible against their principals on grounds very similar to those which govern the declaration of co-partners. The principal constitutes the agent as his representative in the transaction of certain business. Whatever, therefore, the agent does in the lawful prosecution of business, is the act of the principal. The rule is one of substantive law and not

> evidence. It is founded on the legal identity of interest subsisting between the parties. They are original evidence and not hearsay: and being regarded as verbal acts they are receivable in evidence without calling the agent himself to prove them.

[56] In the present case, the defendant's position in repudiating the plaintiff's claim contradicts the admissions or recommendations made by the adjuster (DW1) in the adjuster's report (D20). That position cannot stand in the face of the report. The same reasoning was given by the Court of Appeal in *Cheng Heng Loong Goldsmiths (supra)* where it was said as follows:

> This finding however contradicts the admission in the Adjusters' Report P9 that the robbery was genuine and not fraudulent. A finding that the robbery was faked and never happened cannot stand in the face of an admission to the contrary by the Respondent. In our judgment, the appellant having adduced the admission in P9 discharged the tactical burden on it that the robbery was genuine and had indeed happened. The burden then shifted to the Respondent to prove that the robbery was faked and never happened.

[57] The date of arrival of the goods at Port Klang is also in issue. This will determine how long the goods in question were stored at Gudang 3B before the fire broke out on 12 July 1990. This in turn will determine whether it was reasonable for the goods to be stored there for the duration before they were taken out to be transported to the plaintiff's final warehouse in Malacca.

[58] The plaintiff is saying that the goods arrived on 5 July 1990 while the defendant is saying that the goods arrived on 31 May 1990. To the plaintiff the goods were stored at Gudang 3B awaiting transit to Malacca only for 7 days before the fire broke out on 12 July 1990. On the other hand the defendant claimed that the goods were stored there for a period of 42 days without any steps taken to transport them to Malacca.

[59] To prove their point the defendant again relied heavily on the evidence of DW1 (the adjuster) in court. DW1 concluded that the goods arrived at Port Klang on board the vessel "Maersk Tauro" Voy. 9022 on 31 May 1990 and was trucked to Gudang 3B on the same day. This was based on Customs' Declaration Form dated 30 May 1990; 7 Consignments Notes emanating from

Konsortium Perkapalan (the Hauliers) dated 31 May 1990, tendered through DW1 and police report lodged by PW1 on 14 July 1990 (two days after the fire).

[60] The relevant Customs' Declaration Form (P10) bears the official marking of the customs reading "Diterima – 30 May 1990" which evidences that the form was submitted to the customs on 30 May 1990. It also stipulates under the heading "Date of Import" the date "31 May 1990" which evidences the expected date of arrival of the vessel at Port Klang. It is the usual practice for the Customs' Declaration Forms to be submitted to the Customs before the arrival of the vessel. The defendant claimed that those dates in the Customs Declaration Forms strongly suggest that the vessel arrived at Port Klang on 31 May 1990. This is only a suggestion by the defendant. No conclusive evidence to show that the vessel in question had actually arrived at Port Klang on 31 May 1990. DW1 in his evidence confirmed that "it is not stated in the form (P10) about the arrival of shipment." The Consignment Notes also did not specifically state that the goods actually arrived at Port Klang on 31 May 1990. The date 31 May 1990 stated in the Consignment Notes refers to the "ETA/Arrived" ie, expected time of arrival. That is only an expectation. It does not conclusively prove that the goods actually arrived at Port Klang on 31 May 1990.

[61] PW1 on the other hand, in his cross-examination testified that the plaintiff's shipment arrived on 5 July 1990, and the date 31 May 1990 is the date the goods were to be shipped.

[62] In any event the court is of the view that the date of arrival of the vessel and the goods at Port Klang is only a side issue and the determination of which does not help either party. As has been highlighted above even, if the date of arrival is 31 May 1990 as claimed by the plaintiff, it is only to determine how long the goods were stored at Gudang 3B before the fire. The evidence of PW1 and the adjuster's report prepared by DW1 (D20) has highlighted that the goods were in temporary storage while in Gudang 3B, awaiting to be unstuffed before further carriage to the plaintiff's warehouse in Malacca.

Burden Of Proof

[63] The defendant, in their defence, claimed that the insurance coverage terminates on delivery of the goods to Gudang 3B as "any other warehouse or place of storage whether prior to or at

the destination named therein, which the Assured elect to use for storage other than in the ordinary course of transit", as stipulated in cl. 8.1.2.1 of the Institute Cargo Clause (A). The burden of proof lies on the defendant to establish that the goods were stored in Gudang 3B for storage "other then in the ordinary course of transit" within the meaning of cl. 8.1.2.1.

[64] The issue of burden of proof in a situation like this, arose for determination before the Supreme Court in *Malaysia National Insurance Sdn. Bhd. v. Rubber Development Corporation* [1986] 2 MLJ 124. The facts of the case are as follows:

> In this case the Respondent had taken out a policy of insurance to cover processed rubber goods in transit. The goods were exported through Port Klang. On the way to Port Klang for shipment the goods were temporarily housed at the Respondent's godown in Sungei Way. A fire broke out at the godown and the goods were destroyed. The Respondent claimed indemnity for the loss of the goods from the appellant under the policy of insurance. The appellant denied liability contending that the goods were being housed in the godown for the purpose of storage, making up, packing or processing. Under the policy the appellant was only liable if the goods were lost, damaged or destroyed by fire while temporarily housed in the ordinary course of transit other than for the purpose of storage, making up, packing or processing. The learned trial judge gave judgment for the Respondent holding that the rubber was kept in the godown in the course of transit to Port Klang. He also held that the burden to proof was on the appellant to bring the case within any of the exceptions of the policy.

[65] The Supreme Court upheld the trial judge decision on the issue of burden of proof Lee Hun Hoe CJ, delivering the judgment of the court held as follows:

> We do not think the learned Judge was wrong to say that the burden of proving the exception was on the appellant who was relying on the exception to escape liability. The learned Judge used the two-pronged approach. First, he said that certain provisions of the policy were ambiguous, therefore, the *contra proferentem rule* must be invoked in construing the policy. Secondly, if he was wrong, that is, if there is no ambiguity in the language of the policy, the appellant was still liable to indemnity the Respondent. The reason is that the appellant relies on the ascertion that the Respondent has contravened Exception 6 of the policy. The burden of proof was on the appellant. The law has been stated quite clearly by Lord Goddard CJ. in *Bond Air Services Limited v. Hill* as follows:

> But I cannot find that these cases have ever been regarded either in any judgment or in the opinion of eminent text writers, as throwing doubt on what I think is axiomatic in insurance law, that, as it is always for an insurer to prove an exception, so it is for him to prove the breach of a condition of which would relieve him from liability in respect of a particular loss.

On the evidence, the learned Judge held that the appellant had failed to discharge that burden. We see no reason to differ from is view.

[66] The law on the burden of proof in this case is governed by ss. 101 and 102 of the Evidence Act 1950. In accordance with s. 101, the legal burden of establishing that the loss was due to an insured peril lies on the plaintiff. This is not denied by the defendant. In fact it is accepted by the defendant's loss adjuster's (DW1) in his report (D20). The burden of proof is on the Defendant to establish that the loss falls under an exception of the policy. At the trial, the plaintiff adduced evidence to demonstrate the goods were in Gudang 3B warehouse for transit to final warehouse in Malacca. In fact the defendant's own loss adjuster's report (D20) expressly makes the same findings of fact. The evidential burden of proof then shifted to the defendant. The onus now is on the defendant to prove that the goods were in fact stored at the warehouse (Gudang 3B) for storage "other than in the ordinary course of transit" in order to support their defence that the insurance coverage had terminated on delivery of the goods to the said warehouse (Gudang 3B) as stipulated under cl. 8.1.2.1. of the Institute Cargo Cover (A). This is in line with the decision of the Supreme Court in *American Home Assurance Co. v. Nalin Industries Sdn. Bhd.* [1993] 3 CLJ 319 whereby it was held:

> The Respondent bears the burden of establishing that its claim falls within the peril insured against However, the onus of proving that the event comes under a certain exception has on the party repudiating the claim, the appellant.

[67] After going through all the evidence adduced by both parties and on the balance of probabilities, the court is satisfied that the defendant has failed to discharge that burden of proof. The defendant has failed to prove that it was the intention and agreement of the parties that the voyage was to end in Kuala Lumpur (as stated in the Off-Cover Policy), contrary to the Marine Open-Cover Policy. The defendant has also failed to prove

that the goods were not in transit while they were in the said warehouse Gudang 3B. They are bound by their own loss adjuster's report (D20).

[68] On the above considerations, on facts and authorities, the court finds that the insurance provided by the contract of Insurance (the Off-Cover Policy dated 20 June 1990) issued pursuant to the Marine Open-Cover Policy had not terminated when the goods in question were delivered to Gudang 3B at Port Klang.

Conclusion

[69] Based on the above considerations and on the balance of probabilities, the court comes to the following conclusions on all the issues to be determined, namely:

(i) that the Off-Cover Policy issued on 20 June 1990 was issued 'off-cover' the Marine Open-Cover Policy dated 25 April 1989;

(ii) that the said Off-Cover Policy could not contradict the terms and conditions of the said Marine Open-Cover Policy;

(iii) that the said Off-Cover Policy contained a mistake as to the voyage duration and it can be rectified now;

(iv) that the said Off-Cover Policy had not terminated when the goods were delivered to Gudang 3B at Port Klang. The said policy was still in force when the fire broke out.

[70] Based on the above findings, the court is satisfied that on the balance of probabilities, the plaintiff has established their claim against the defendant. Therefore, the plaintiff's claim is allowed with costs.